PD-0676-19
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 7/18/2019 6:43 PM
Accepted 7/23/2019 10:57 AM
DEANA WILLIAMSON
CLERK

No. PD—0676—19

FILED
COURT OF CRIMINAL APPEALS
7/23/2019
DEANA WILLIAMSON, CLERK

IN THE COURT OF CRIMINAL APPEALS
SITTING AT AUSTIN, TEXAS

MICHAEL JOSEPH TILGHMAN, Appellant
v. THE STATE OF TEXAS, Appellee

REPLY TO THE STATE'S PETITION FOR DISCRETIONARY REVIEW

From the Third Court of Appeals, sitting at Austin, Texas
Third Court of Appeals No. 03—17—00803—CR
274th Judicial District Court, No. CR—16—1126
San Marcos, Hays County, Texas
Honorable Gary L. Steel, Judge Presiding

To the Honorable Court of Criminal Appeals: Comes now, Paul M. Evans, Attorney for Appellant, and files this, his Reply to the State's Petition for Discretionary Review, pursuant to Texas Rule of Appellate Procedure § 68.9.

Respectfully submitted,

__/s/ Paul M. Evans
Paul M. Evans
Attorney for Appellant
SBN 24038885
P.O. Box 660
Lockhart, Texas 78644
(512) 569-1418
(512) 551-1550 FAX
paulmatthewevans@hotmail.com

***** ORAL ARGUMENT IS NOT REQUESTED**

Identity of Parties and Counsel

Presiding Trial Court Judge:	Honorable Gary L. Steel Hays County Government Center, 3rd Floor 712 South Stagecoach Trail San Marcos, Texas 78666
Appellant:	Michael Joseph Tilghman TDCJ # 02169940
Trial and Appellate Counsel:	Paul M. Evans P.O. Box 660 Lockhart, Texas 78644
Appellee:	State of Texas
Trial Counsel:	Wesley H. Mau Criminal District Attorney Michael C. McCarthy Erika Price Assistant Criminal District Attorneys Hays County Criminal District Attorney 712 South Stagecoach Trail San Marcos, Texas 78666
Appellate Counsel:	Wesley H. Mau Criminal District Attorney Michael C. McCarthy Assistant Criminal District Attorney Hays County Criminal District Attorney 712 South Stagecoach Trail San Marcos, Texas 78666

Table of Contents

Index of Authorities

Federal Constitution

Federal Cases

Texas State Constitution

Texas State Statutes

Texas Cases

Introduction

By a majority decision with one justice dissenting, the Third Court of Appeals reversed Appellant's conviction for Possession of a Controlled Substance with Intent to Deliver. The majority held "that the police, by opening the door to Tilghman's hotel room and entering the room without a warrant, while Tilghman still had a right to occupy the room, violated Tilghman's Fourth Amendment rights." The majority also held that no applicable exceptions to the warrant requirement were applicable. *See Tilghman v. State*, ___ S.W.3d ___, No. 03-17-00803-CR (Tex.App.—Austin June 7, 2019), 2019 WL 2408972, Slip Op. at 28, WL at 14.[1]

Reasons for Denying the State's Petition

The Third Court's majority decision conflicts with neither Federal nor State case law as they relate to the Fourth Amendment. Nor has the Third Court created new and confusing regulations for hoteliers. Rather, the majority of the Third Court panel has simply followed and upheld applicable precedents relating to the

[1] As noted in the State's Petition for Discretionary Review, the pagination differs between the Court of Appeals slip opinion (available at http://search.txcourts.gov/Case.aspx?cn=03-17-00803-CR&coa=coa03) and the slip opinion available on the Westlaw online publication. Pinpoint cites herein will include both for ease of reference. *See* State's Petition at 8, fn. 4.

Fourth Amendment's prohibition against unreasonable search and seizure. While the justices on the panel have disagreed on a material question of law—*see* Texas Rule of Appellate Procedure § 66.3—the majority decision is the correct application of Fourth Amendment jurisprudence. The State's Petition—which either misconstrues the majority opinion or else mischaracterizes the nature of the Fourth Amendment violation—should be denied. In the alternative, should this Court decide to review the instant cause, the majority opinion should be upheld.

Statement Regarding Oral Argument

The undersigned counsel concurs with the State's position regarding oral argument and does not believe the decisional process would be significantly aided by further oral argument.[2]

Reply to State's Ground for Review

The State frames its "Ground for Review" as follows:

> Did the Third Court of Appeals err in holding *that a hotel manager* who is accompanied by law enforcement *may not open and enter a hotel room to effectuate a hotel guest's eviction* due to ongoing criminal activity when multiple attempts to contact the room's occupants, including knocking on the door, failed?

[2] The undersigned counsel would note that the Third Court entertained oral argument between the parties on April 24, 2019. A recording of the proceedings is available on the Third Court's website (*see* http://www.txcourts.gov/3rdcoa/oral-arguments/).

See State's Petition at 7 (emphasis supplied). The problem is, the majority decision of the Third Court did not so hold. One may search the majority opinion from stem to stern, and no such finding is to be seen. Rather, the majority held "that *the police*, by opening the door to Tilghman's hotel room and entering the room without a warrant, while Tilghman still had a right to occupy the room, violated Tilghman's Fourth Amendment rights." *Tilghman*, Slip Op. at 28, WL Op. at 14 (emphasis supplied). The State is in error when it asserts the majority "held that *when the manager unlocked the door* for the police to effectuate the eviction, the officers violated Appellee's [*sic*] Fourth Amendment. [*sic*]." *See* State's Petition at 7 (emphasis supplied). Likewise, the State is in error when it asserts that the majority "decid[ed] * * * that [Appellant's] Fourth Amendment rights were violated when *the hotel manager entered* only after Appellee [*sic*] and his guests refused to respond to attempts to contact them." *See* State's Petition at 8 (emphasis supplied).

The State appears to wholly misconstrue the majority holding, as evidenced by its assertion that "the majority overlooks completely the fact that when the police entered the hotel room, no search or seizure was taking place." *See* State's Petition at 9. The State completely overlooks the fact that the Fourth Amendment violation occurred at the hands of the police—not the hotel manager—at the precise moment the officers took the initiative and "opened the door themselves

and proceeded to enter the room," and that this very entry constitutes the unlawful search and seizure. *Tilghman*, Slip Op. at 16, WL Op. at 8. As the majority opinion states, "We note that the Fourth Amendment violation was not limited to the physical entry into the hotel room but occurred as soon as the police opened the door to the room, enabling them to see and hear what was occurring inside." *See Tilghman*, Slip Op. at 16, fn. 6; WL Op. at 8, fn. 6, *citing Kyllo v. United States*, 533 U.S. 27, 37 (2001); *Katz v. United States*, 389 U.S. 347, 353 (1967); *United States v. Conner*, 127 F.3d 663, 666 (8th Cir. 1997); *United States v. Berkowitz*, 927 F.2d 1376, 1387 (7th Cir. 1991); *United States v. Maez*, 872 F.2d 1444, 1451 (10th Cir. 1989); *United States v. Winsor*, 846 F.2d 1569, 1572 (9th Cir. 1991) (en banc). *See also Tilghman*, Slip Op. at 10; WL Op. at 5, *citing State v. Rodriguez*, 521 S.W.3d 1, 8-9 (Tex.Crim.App. 2017); *Moberg v. State*, 810 S.W.2d 190, 194 (Tex.Crim.App. 1990); *see also Valtierra v. State*, 310 S.W.3d 442, 448 (Tex.Crim.App. 2010).

The State argues that "the majority imposes requirements on Texas hoteliers to 1) create eviction policies, 2) promulgate eviction policies to guests; and 3) provide eviction notice to occupants prior to effectuating eviction," even going so far as to accuse the majority of exceeding their Constitutional authority by ignoring the Constitutional separation of powers and "impos[ing] rules on hoteliers that [the] Texas Legislature has declined to impose." *See* State's Petition at 10, *citing*

Tilghman, Slip Op. at 13-16; WL Op. at 7-8; State's Petition at 13, *citing* Tex. Constitution, Art. II, § 1. The State asserts that "the majority's new eviction polices [*sic*]" will create a dilemma for police and place them "in an untenable position" while forcing upon hoteliers a "Hobson's choice in the face of potentially illegal or dangerous hotel room activity." *See* State's Petition at 12.

The State overlooks some very basic and undeniable facts. In this instance, the hotel management sought police help to evict hotel guests. The police gave the assistance that was requested. The eviction was very effectively and quickly performed once they arrived. The hotel received the exact result it had sought. *See Tilghman*, Slip Op. at 2-7; WL Op. at 1-3. The undersigned counsel fails to see what dilemma has been created for hoteliers. The admissibility or non-admissibility of evidence in a criminal proceeding has no bearing on the hotel's ability to evict obnoxious guests under warranted circumstances.

The majority opinion discusses a number of Federal and State authorities presented by the State on direct appeal to support its argument "that the eviction provided the police the authority to enter the room without a warrant." The majority found that "[t]he common thread in these cases is evidence showing that the guest has been evicted from the hotel or his term of occupancy has expired, thereby diminishing his reasonable expectation of privacy in the room." *See Tilghman*, Slip Op. at 11-13; WL Op. at 6. The State fails to appreciate that the

majority's discussion of rental agreements or eviction policies does not impose any new requirements on hoteliers. *See* State's Petition at 10-15; *Tilghman*, Slip Op. at 13-14; WL Op. at 7. Seemingly, it would not be a terrible burden on hoteliers to devise and implement a boilerplate rental agreement for their tenants, one that clearly spells out how and under what circumstances an eviction may take place. It might even be a sound business practice, easily implemented and enforced upon check-in, which could be effective in addressing any number of concerns including but not limited to eviction. And, if such an agreement had been in place in the instant case, perhaps these obnoxious guests would have been on notice in advance that their privacy rights were subject to certain defined limitations, potentially leading to the admissibility of the challenged evidence. But such was not the case. *See Tilghman*, Slip Op. at 13-14; WL Op. at 7.

The State ignores the fact that police were already free to refuse to assist hotels with evictions. *See* State's Petition at 12. Nor is it true that by virtue of the majority opinion, "all law enforcement would be permitted to do is stand outside of the room while averting their eyes so as to not violate the guests' reasonable privacy expectations." *See* State's Petition at 12.[3] Under the circumstances at bar, prior to the expiration of the term of occupancy and without any indication that

[3] At oral argument before the Third Court, the undersigned counsel conceded that if the hotel manager had himself opened the door wide under the circumstances at bar while officers stood by in the hallway, their plain-view observations—if any—would not offend the Fourth Amendment.

Appellant's reasonable expectation of privacy had been diminished by way of notice of eviction, the officers were not allowed to enter the room without a warrant. The majority opinion did not create any dilemma. Rather, any dilemma faced by the officers is the product of basic Fourth Amendment protections against unreasonable search and seizure by the State.

Conclusion

This is not an instance where the majority opinion conflicts with Federal or State case law regarding the Fourth Amendment. Rather, the State simply disagrees with the majority opinion's interpretation and application of said authorities. The State thereby seeks to have this Court act as an appellate court to review the majority decision of the Court of Appeals. A petition for discretionary review is not an appeal within the constitutional purview of Article V, § 26 of the Texas Constitution and should not be used as such. *Todd v. State*, 661 S.W.2d 116, 121-22 (Tex.Crim.App. 1983). This Court should deny the State's petition. This Court should not engage in an appellate review of the Court of Appeals' majority decision. In the alternative, should it consider doing so, the majority decision was properly reached and should be upheld.

Respectfully submitted,

__/s/ Paul M. Evans_____

Paul M. Evans
P.O. Box 660
Lockhart, Texas 78644
(512) 569-1418
(512) 551-1550 FAX
SBN 24038885
paulmatthewevans@hotmail.com

Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing Reply to the State's Petition for Discretionary Review was delivered by e-service to the office of the Criminal District Attorney of Hays County, both to Criminal District Attorney Wesley H. Mau and Assistant Criminal District Attorney Michael C. McCarthy—mailing address 712 S. Stagecoach Trail, San Marcos, Texas 78666, physical address 509 W. 11th Street, Austin, Texas 78701—on this the 18th day of July, 2019. I additionally certify that on this day service was made via the State e-filing service on Stacey Soule, the State Prosecuting Attorney, at information@spa.texas.gov.

___/s/ Paul M. Evans_____

Paul M. Evans

Certificate of Compliance

I hereby certify that this document complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document does comply with the word-count limitations of Tex. R. App. P. 9.4(i) because it contains 1,672 words, excluding any parts exempted by Tex. R. App. P. 9.4(i)(1).

___/s/ Paul M. Evans_____

Paul M. Evans